

Exhibit S

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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 UNITED STATES OF AMERICA,

4 v.

17 Cr. 722 (VSB)

5 SAYFULLO HABIBULLAEVIC SAIPOV,

6 Conference

7 Defendant.

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8 New York, N.Y.
9 June 22, 2018
10 3:30 p.m.

11 Before:

12 HON. VERNON S. BRODERICK,

13 District Judge

14 APPEARANCES

15 GEOFFREY S. BERMAN

16 United States Attorney for the
17 Southern District of New York

AMANDA L. HOULE

17 ANDREW BEATY

MATTHEW LaROCHE

18 Assistant United States Attorneys

19 DAVID E. PATTON

20 Federal Defenders of New York, Inc.
21 Attorney for the Defendant

DAVID E. PATTON

21 JENNIFER BROWN

22 ALSO PRESENT: LISA KOROLOGOS, USAO Wall Team
23 ELIZABETH HANFT, USAO Wall Team
24 NODIRA ISAMIDDINOVA, Interpreter (Uzbek)
25 MICHAEL DeLUCA, Paralegal USAO

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(Case called)

MS. HOULE: Good afternoon. Amanda Houle, Andrew Beaty, and Matthew LaRoche, for the government. With us at counsel's table is our paralegal, Michael Deluca. I'd also like to note for your Honor that the AUSAs from the wall team, Ms. Korologos and Ms. Hanft, are also in the courtroom today.

THE COURT: All right. Thank you.

MR. PATTON: Good afternoon. David Patton, from the Federal Defenders. And at counsel table are Jennifer Brown and David Stern, on behalf of the Mr. Saipov, who's present in following the proceedings with an Uzbek interpreter.

THE COURT: Thank you.

The only thing I ask is that whoever is going to speak, you just please remember to pull the microphone close to you just because this courtroom, unless you do so, it's going to be very difficult for the court reporter to hear everything that's going on.

Let me ask, Mr. Saipov, can you hear and understand the interpreter?

THE DEFENDANT: (In English) Yes.

THE COURT: If at any point in time you have difficulty hearing the interpreter or you want time to speak to your attorneys, just raise your hand, and we'll try and fix the headset or I'll allow you some time to speak with your attorneys. OK?

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1 THE DEFENDANT: (In English) OK.

2 THE COURT: All right. The first order of business is
3 to arraign Mr. Saipov on the superseding indictment which was
4 returned earlier this week.

5 Mr. Patton, has your client seen and a copy of the
6 superseding information and has it either been translated or
7 read to him?

8 MR. PATTON: Yes, your Honor. I reviewed the
9 superseding indictment with Mr. Saipov with the assistance of
10 an Uzbek interpreter. He waives its public reading and wishes
11 to enter a plea of not guilty.

12 THE COURT: All right. So the record will reflect
13 that Mr. Saipov will enter a plea of not guilty.

14 All right. The next order of business, and just so
15 that the parties know, I intend to first go through
16 discovery-related issues and motion-related issues and then to
17 discuss the issue related to -- the narrower issue related to
18 the special administrative measures, although it could blur
19 into some broader discussion of the SAMs, as well as the motion
20 that is currently being briefed. And then I plan on discussing
21 trial dates, potential trial dates.

22 First, with regard to the parties' application
23 concerning the SAMs motion, I have granted the application to
24 extend the time, and so that should hit the docket later on
25 today, at the latest Monday. So I note with regard to when the

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1 briefing would be due.

2 So let me ask this with regard to the discovery
3 issues: I noted that there was going to be production, I think
4 today, of some additional transcripts, and the like. So let me
5 ask the government, have those items been produced, and if they
6 haven't, what the timing of that would be? And then, second,
7 what, if any, additional discovery has yet to be produced?

8 MS. HOULE: Thank you, your Honor.

9 Those additional translations were produced last
10 night. There are no pending translations at this time, and
11 there is no pending Rule 16 discovery.

12 THE COURT: Just to confirm, because there was a
13 question I had the last time, and I assume it's still the same,
14 that currently there are no CIPA-related materials that we're
15 going to have to deal with here?

16 MS. HOULE: Yes, your Honor. As we indicated at the
17 last conference, we certainly don't anticipate any substantial
18 CIPA motion practice here.

19 THE COURT: OK.

20 MS. HOULE: The government is continuing to review
21 whether or not there will be any motions made.

22 THE COURT: The only thing I ask is that -- well,
23 actually, I think what makes sense is perhaps we revisit the
24 issue once we discuss trial dates. To the extent there is
25 going to be that kind of motion practice, I'd like to get a

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1 sense of when that would happen.

2 All right. Let's now move to the issue related to the
3 SAMs, the narrow request by the government which relates to
4 being able to monitor family visits should they occur in the
5 future. My prior ruling related to purely the visitor log and
6 that the visitor log should be reviewed by a wall team and any
7 redactions, and the like, be done in that fashion.

8 However, as I understand it, since the institution of
9 the special administrative measures with regard to Mr. Saipov,
10 the government has made an application, I think, one, with
11 regard to the list itself, that with regard to that, that they,
12 the government, the prosecution team, should be allowed to see
13 the nonlegal individuals on that list.

14 Let me just ask, I just want to clarify one point with
15 regard to that, and I think I know the answer. We were talking
16 about legal versus nonlegal in my prior order. Is it the
17 government's contemplation that the experts -- and, again, I
18 know that the current SAMs doesn't provide that experts can
19 visit -- but that experts are included as part of that, the
20 legal review?

21 MR. BEATY: Yes, your Honor. The experts, defense
22 investigators, paralegals, and counsel for the defendant are
23 all covered under the legal side of that distinction.

24 THE COURT: OK.

25 MR. BEATY: I believe there's been a modification to

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1 the SAMs explicitly to allow experts to visit him --

2 THE COURT: OK.

3 MR. BEATY: I'm not part of the wall team, so I'm only
4 aware that a modification has been made, but I believe it
5 includes the specific experts who have been approved to see
6 him.

7 THE COURT: I see. I'm looking around for a member of
8 the wall team. Ms. Korologos, could you step up for a moment?

9 MS. KOROLOGOS: Sure.

10 THE COURT: The only thing I want to ask, although I
11 recognize that there may be a reason why the prosecution team
12 doesn't have a copy of the current SAMs related to Mr. Saipov,
13 could I make a request, could you provide me with a copy of the
14 current SAMs?

15 MS. KOROLOGOS: Yes, your Honor, I have both redacted
16 and nonredacted versions of the SAMs, and then there's been two
17 modifications.

18 THE COURT: OK.

19 MS. KOROLOGOS: In the redacted versions, the names of
20 the defense legal visitors have been redacted.

21 THE COURT: OK. All right.

22 MS. KOROLOGOS: I have those with me in court if that
23 would help.

24 THE COURT: It actually would. If you could hand up a
25 copy, that would be great.

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1 MS. KOROLOGOS: Do you want the unredacted version?

2 THE COURT: Unredacted version, yes, please. Thank
3 you. Actually, if you have copies of both, I'll take both just
4 to make sure I have those.

5 MS. BROWN: Your Honor, I don't think we have a copy
6 of the document that she's about to hand up.

7 THE COURT: Do you have extra copies for -- well, I
8 assume -- let me just ask. I think I understood you to
9 indicate that the redactions relate to the names of basically
10 what would be consistent with my order, that the prosecution
11 team not be made aware of the names of the experts, and the
12 like.

13 Are those the redactions? I guess what I'm asking is
14 can the defense have an unredacted copy?

15 MS. KOROLOGOS: Yes.

16 THE COURT: So if you could provide a copy of each of
17 those to the defense, that would be great, if you have them.

18 MS. KOROLOGOS: Today I have one redacted and one
19 unredacted. Since the defense counsel know the names of their
20 witnesses, I propose I give the Court the unredacted version.

21 THE COURT: That's fine. I think what makes sense is
22 that, and this is another issue, what makes sense,
23 Ms. Korologos, if you could make sure that the transmittal at
24 least of the unredacted -- you don't have to put, obviously,
25 the unredacted on the docket. I just want a record that you've

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1 sent it; that the defense has received it. So it should be
2 something that actually -- and you could do that by cover
3 letter saying enclosed is a copy of it, a redacted version
4 which has been put on the docket since we have -- the SAMs is
5 already part of the document anyway.

6 MS. KOROLOGOS: OK.

7 THE COURT: All right. This was another issue that I
8 wanted to raise related to submissions that are made, in
9 particular submissions that are made under seal and/or
10 redacted. Prior to any redactions being submitted, you should
11 make a request to me for that, and I just want to make sure
12 that we have -- I think initially the SAMs were communicated to
13 me, but there was no -- initially, they were filed, I think,
14 under seal, to be filed under seal, but I don't believe that
15 that ever actually happened. I just want to make sure that
16 when something is going to be -- when an application is made
17 that something be filed under seal and I grant the application,
18 that the documents are, in fact, filed under seal.

19 Secondly, with regard to the indictment, the
20 superseding indictment, I received a copy of it. It was an
21 attachment to a letter. The superseding indictment had been
22 redacted, and so I had not -- well, it had been redacted.
23 However, on the public docket there's also an unredacted
24 version that I think was filed probably by the clerk's office
25 once the superseding indictment was processed.

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1 So I guess my question is for the government. (a) I
2 hadn't received a request to file it, any portions of it, for
3 it to be redacted, but (b) is that a request that the
4 government would make at this time?

5 MS. HOULE: No, your Honor.

6 THE COURT: All right. That's fine.

7 The principal reason that I just mention this is that,
8 at the end of the day, I want to have a complete record of what
9 is received and what is filed under seal, and that goes for
10 both counsel, all counsel, just so that we make sure that the
11 docket has everything, even if it's something that's filed
12 under seal.

13 Yes, Ms. Korologos.

14 MS. KOROLOGOS: May I pass up the two unredacted
15 versions to the Court, and I'll drop off these at counsel
16 table?

17 THE COURT: OK. Thank you. All right.

18 So I do have some questions, I think, with regard to
19 the current application that the government, the prosecution
20 team, be allowed to monitor family visits. First let me ask
21 the defense, with regard to family communications, am I correct
22 that prior to the imposition of the SAMs, would telephone
23 communications between Mr. Saipov and his family members, would
24 those have been recorded by the Bureau of Prisons?

25 MS. BROWN: Yes, your Honor.

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1 THE COURT: Are you aware of any cases, whether it's
2 case law or precedent, for those calls not being recorded in
3 death penalty cases where SAMs has not been imposed?

4 MS. BROWN: I'm not sure I heard your question, not
5 being record -- because there's a difference between
6 contemporaneous monitoring and recording, and we're focused on
7 the contemporaneous monitoring as opposed to the recording.

8 THE COURT: Well, I understand that there's a timing
9 difference, but the government -- as I understand, the crux of
10 the argument is that there would be a disclosure, or potential
11 disclosure, of defense strategy based upon communications with
12 Mr. Saipov and his family members principally related to
13 penalty phase-related matters and mitigation-related matters.

14 So my question goes to the issue of -- while I
15 understand it's a timing difference, the government would still
16 be able to gain access to the recording. So what I was trying
17 to figure out is whether or not there's precedent in cases
18 where SAMs has not been imposed, where the defense has sought
19 and obtained the ability to not have family calls recorded by
20 the Bureau of Prisons.

21 MS. BROWN: I'm not aware of any situation where there
22 was no recording of family calls.

23 THE COURT: All right. Similarly, I don't know what
24 arrangements the family visits would have occurred with
25 Mr. Saipov and family members. So let me ask, because

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1 typically, as I understand it, the attorney visits are private,
2 in other words, they are done in a room where it's the attorney
3 and the client; and that other visits, nonlegal visits, are
4 done in a room where, although there won't be necessarily a
5 Bureau of Prisons person actively listening in, they are
6 present.

7 I guess my question relates to what was the process or
8 do you know what the process would have been without the SAMs
9 for Mr. Saipov?

10 MS. BROWN: Your Honor, so the process, given where
11 Mr. Saipov is being housed at the MCC, the physical space for
12 the social visit, family visit is actually the same physical
13 space as where the attorney-client visit is, which is to say,
14 it is a private room with doors closed, and it's noncontact.

15 THE COURT: So my subsequent question relates not
16 specifically to Mr. Saipov's situation, but to death penalty
17 cases more generally, and specific death penalty cases where
18 SAMs has not been imposed.

19 Are there cases where it's a death penalty case, no
20 SAMs imposed, where the visits with family members are in
21 private? In other words, I understand Mr. Saipov's situation,
22 and it may be other death penalty cases are similar, in other
23 words, that the family visits would be in private because of
24 the other restrictions, but are you aware of a death penalty
25 case where SAMs has not been imposed where the visiting isn't

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1 the normal visiting for -- where the visiting room is with
2 other people?

3 MS. BROWN: Just a minute.

4 (Counsel conferred)

5 MS. BROWN: I think the difficulties that we're having
6 is the issue of whether it's private or not. So where
7 Mr. Saipov is housed, it's the closed room --

8 THE COURT: Yes.

9 MS. BROWN: -- and physically private. But even in an
10 area where several visits are happening at once, they are
11 private in the sense that the individuals are speaking to each
12 other in person. They could whisper. There's no one able to
13 hear what they say if they modulate their behavior. So, in
14 general, social visits are private in both capital and
15 noncapital when SAMs is not an issue.

16 THE COURT: But in any capital cases where there have
17 been no SAMs, has the defense requested that those visits, in
18 essence, be treated as legal visits?

19 MS. BROWN: I don't think there's a need to is what
20 we're saying because they can maintain the privacy of their
21 communications by not speaking loudly.

22 THE COURT: All right. Thank you.

23 Now, these questions aren't specifically -- well, I
24 think, actually, I've gotten an answer with regard to the
25 government's position with regard to experts, and I'll take a

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1 look at the modification of the SAMs, because I think that's
2 relevant, obviously, to the motion that has been filed.

3 Let me ask the government just to articulate exactly
4 what the limited application is that they're currently seeking
5 from me.

6 MR. BEATY: Yes, your Honor. We're just asking the
7 Court to clarify that its order with respect to the wall team
8 is only limited to approving legal visitors into the MCC. That
9 was the scope of the Court's original order, but we were
10 subsequently informed that defense took the position that we
11 should not have access to the defendant's nonlegal
12 communications; that the case team should not be permitted to
13 monitor them, either the phone conversations or the in-person
14 conversations. We're just asking the Court to clarify the
15 scope of its original order and to allow the case team and the
16 FBI agents who are part of the case team to monitor and have
17 access to those calls and meetings.

18 THE COURT: All right. In part, because I think my
19 ruling may be different depending on (a) the briefing that is
20 currently ongoing, I know there's a challenge by the defense to
21 the imposition of SAMs as a general matter. However, based on
22 the discussion here, there may be, at least in my mind, a
23 difference between calls which are monitored by the Bureau of
24 Prisons in the normal course and, as I understand it, would be
25 monitored of a family member in a death penalty case regardless

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1 of whether or not the penalty phase was at issue, in other
2 words.

3 So what I propose is the following: In the period
4 between now and the time that the briefing is completed, I'm
5 going to maintain that the wall team should conduct any review
6 or monitoring during that time period until such time I can
7 rule on the entire motion that's being made by the parties
8 because, again, there may be certain distinctions that I'm
9 going to make in connection with that ruling.

10 In addition, I'll note that right now I've gotten only
11 the defense motion, and I haven't received the government's
12 response.

13 So that, again, is my preliminary ruling, in other
14 words, with the understanding that I'm going to revisit it.

15 Yes.

16 MR. BEATY: Yes, your Honor, if I may, I would just
17 point out that I think this issue is separate from the SAMs
18 issue in many ways, because as the Court noted, the calls that
19 the defendant makes are recorded in the normal course. And
20 right now, for example, the one call that has been made, we
21 have not, the case team has not, gotten access to that due to
22 the defense's position that it can only go to the wall team.
23 That's not affected by the SAMs. That's only affected by the
24 defense's position that the defendant's communications with his
25 immediate family members are somehow covered by the Sixth

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1 Amendment.

2 THE COURT: OK. Let me hear from the defense with
3 regard to just the calls.

4 MS. BROWN: Your Honor, with regard to just the calls,
5 to be clear, we have no objection to them being recorded. What
6 we do have an objection to is, as he accurately states, the
7 case team having access to that recording at this time. It's
8 the timing aspect that we think affects the Sixth Amendment
9 rights and particularly in the context of the mitigation
10 preparation in a capital case.

11 THE COURT: But as I understand it, just to clarify,
12 as I understand it, you're unaware of similar applications
13 being made?

14 MS. BROWN: So, your Honor, this is a somewhat unique
15 case in that Mr. Saipov's only access to his family right now
16 is via telephone, to his mother, his father, his sisters, and
17 that is because the United States government has prevented them
18 from getting visas to enter the country. So his use of the
19 telephone to communicate with his family is, in fact, his only
20 possible visitation with his family because of actions of the
21 U.S. government. So it is, in our view, analogous to an
22 in-person visit because it's the only thing available because
23 of actions that were taken by the government.

24 THE COURT: All right. I'm going to maintain my
25 ruling, again, until I get the full briefing from the parties,

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1 that the wall team should conduct the monitoring both of calls
2 and any in-person visits with the family members.

3 MR. BEATY: Your Honor, if I could just respond to the
4 point about the visas and just to clarify for the Court. That
5 was not something that the U.S. Attorney's Office had anything
6 to do with.

7 THE COURT: I understand. It's the State Department,
8 and I understand. But let me -- why don't you make your
9 record. Go ahead.

10 MR. BEATY: Thank you, your Honor.

11 At the defense's request, we looked into why the
12 defendant's mother's visa was revoked. The State Department
13 was contacted, and we were informed that her visa, which she
14 already had, was automatically revoked on November 2 after the
15 attack. That revocation was without prejudice to any future
16 application, and we obviously have taken no position with
17 respect to whether a visa should be granted and play no role in
18 that process.

19 THE COURT: Is that true -- I know you mentioned
20 Mr. Saipov's mother -- but true with regard to any other family
21 members that may have -- although they didn't necessarily have
22 a visa on the date in October of 2017, is it true with any
23 applications that may have been made since then?

24 MR. BEATY: We're not specifically aware of any other
25 applications.

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1 THE COURT: OK.

2 MR. BEATY: The defendant's mother was the person we
3 were asked to look into, which we did.

4 THE COURT: All right. As I said, I'm going to
5 maintain my ruling that, for the time being, the wall team will
6 monitor any calls with family members.

7 Let me ask, is that clear, or is there anything that
8 the parties, any questions the parties have at this time?

9 MR. BEATY: No, your Honor.

10 THE COURT: I should say, obviously, once I get the
11 briefing -- and I think it's due to be completed by July 23 --
12 I'll take a look at that and decide whether oral argument is
13 necessary. I think it's likely I'll have some questions about
14 the submissions, and so what I may do, to the extent I do, I
15 will try, if I can, to give the parties at least some
16 indication of what my questions might be so that when we come
17 back for oral argument, you'll be able to specifically address,
18 at a minimum, the questions I have, just for efficiency
19 purposes.

20 Is there anything else with regard to the SAMs issue
21 that I need to deal with, or does that take care of it?

22 MR. BEATY: Not from the government.

23 THE COURT: All right. From the defense?

24 MR. PATTON: No, your Honor.

25 THE COURT: Let's move on to the issue of trial dates.

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1 Before I get there, because I think this informs the discussion
2 related to trial dates, as I understand it, the current posture
3 of the consideration about whether or not the government's
4 going to seek the death penalty is that the process here in
5 this district has occurred and that the United States
6 Attorney's Office has submitted their paperwork along with the
7 defense submission to the Department of Justice in Washington
8 to the capital case review committee and that a meeting has
9 been scheduled with the defense at some point in July, near the
10 end of July.

11 Is that accurate?

12 MS. HOULE: Yes, your Honor. The meeting is scheduled
13 for July 23.

14 THE COURT: Do you know -- and again, this isn't
15 something that necessarily will be etched in stone -- but do
16 you know whether there is -- once that meeting has occurred,
17 barring any requests by the panel in Washington for additional
18 information from the defense and any back-and-forth that may
19 occur, is there a timeline as to when a decision might be made
20 by the Attorney General?

21 MS. HOULE: Yes, your Honor. We continue to expect
22 that a decision will be made by the Attorney General by
23 September.

24 THE COURT: All right. I know that previously the
25 parties had indicated -- the government had indicated that a

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1 trial date, I think it was in the spring, or something like
2 that, of 2019. And the defense took the position that no trial
3 date should be set, but that spring was too soon and had
4 mentioned the fall of 2019.

5 Let me hear first from the government and then the
6 defense, because I think, in the defense's letter to me,
7 they've indicated that it's still premature to set a trial
8 date, but let me hear from the government.

9 MS. HOULE: Thank you, your Honor.

10 The government continues to believe that an April
11 trial date is appropriate here. If I may, your Honor, I'd like
12 to spend a few minutes addressing some of the arguments made in
13 the defense's recent letters regarding a trial date.

14 THE COURT: Yes.

15 MS. HOULE: Turning first, your Honor, to the public
16 at large and the victims in this case. Their interest in a
17 prompt and a firm trial date cannot be overstated here. When
18 an attack like this occurs where eight people are murdered and
19 dozens more are injured, the public deserves a speedy trial,
20 and the surviving victims deserve to know when that trial is
21 going to be. Indeed, the victims here are anxious to know when
22 that trial is going to be.

23 The defense has repeatedly responded to the
24 government's request for a trial date by stating that there
25 should be no trial set and that the most efficient way for this

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1 case to be resolved is by a guilty plea with a sentence of life
2 imprisonment.

3 First, your Honor can, of course, set a trial date
4 without any prejudice to the defendant pleading guilty at any
5 time between now and that trial date. But more importantly,
6 your Honor, we think that that is an argument that's
7 appropriately made through the capital case process, and that
8 the question for this Court is just when can this case proceed
9 to trial? And we think that all of the circumstances present
10 here demonstrate that an April trial date is the most efficient
11 way to proceed, that it's feasible, and that it's appropriate
12 here.

13 At our January conference, your Honor noted that you
14 would consider, in evaluating that April trial date, whether
15 the parties had kept in line with the time expectations that we
16 presented at that conference, and we have. Discovery in this
17 case was produced in January. The government has met all of
18 its deadlines in providing translations to defense counsel. To
19 the extent that any other materials are submitted for
20 translation, we will produce those promptly to the defense.
21 The capital case process is proceeding efficiently and along
22 the same time frame that we indicated to your Honor back in
23 January.

24 As we just noted, there's a meeting scheduled for
25 July, and we anticipate resolution of that process by

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1 September. An April date would permit significant time for the
2 defense to engage in any mitigation investigation. They have
3 already had eight months to engage in that investigation. An
4 April trial date would permit ten more months to engage in that
5 investigation.

6 As we said, your Honor, this case is, of course,
7 significant and important, but it also is a single-defendant
8 case relating principally to a single incident. And the
9 defense's suggestion that a case involving a single defendant
10 and a single incident cannot proceed to trial for years is
11 unprecedented. The cases cited by the defense in their letters
12 in this district, with the exception of the *Muhammad* case that
13 proceeded before Judge Sand, are all distinguishable in
14 material respects, and I'd like to just review a few of those
15 for your Honor now.

16 First, those cases involved anywhere from four to 14
17 defendants, sometimes with multiple defendants facing the death
18 penalty. The conduct in those cases was alleged to have taken
19 place over substantially longer periods of time than what is
20 alleged here. In the *Barnes* case, for example, the conduct
21 alleged spanned 11 years.

22 THE COURT: Let me just ask, would you be able to
23 break down in those cases -- I apologize for interrupting --
24 but in those cases, how many of the defendants were foreign
25 nationals where the materials that might be sought by the

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1 defense with regard to mitigation are or could be or most
2 likely or many of them are located overseas.

3 MS. HOULE: Well, we think, your Honor, the most apt
4 comparison in relation to that question is the *Muhammad* case
5 that proceeded before Judge Sand. There, the mitigation
6 materials were located abroad. That related to an embassy
7 bombing that took place internationally. So the conduct
8 alleged also took place abroad. And in that case, the
9 defendant, and there are two defendants, were facing the death
10 penalty, and that case proceeded to trial 15 months after those
11 defendants were arrested.

12 We noted as well in the *Tsarnaev* case from
13 Massachusetts where there were also mitigation materials
14 located abroad, that case proceeded to trial 21 months after
15 the defendant was arrested.

16 THE COURT: Go ahead.

17 MS. HOULE: As I noted, your Honor, in the cases
18 highlighted by the defense, the conduct alleged in those cases,
19 some of it was alleged to have taken place over seven years, 11
20 years. We don't think that those are apt comparators to the
21 case here.

22 Moreover, in the majority of those cases, your Honor,
23 there was a delay of anywhere from two to four years between
24 the time when the case was charged and a decision was made
25 about whether or not the government would seek the death

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1 penalty. The only exception to that in the cases highlighted
2 by the defense is the *Quinones* case before Judge Rakoff. And
3 as your Honor is aware, there were delays in that case because
4 the issue of whether or not the government could proceed on its
5 intention to seek the death penalty was then litigated for over
6 a year in the district court and then in the Second Circuit.

7 But at bottom here, your Honor, the circumstance of
8 having two to four years of time lapse before the government
9 makes a decision on whether or not to seek the death penalty is
10 not anticipated here. As we said, we anticipate a resolution
11 of this process by September.

12 I'd note as well, your Honor, in each of the cases
13 cited by the defense, there was motion practice before the
14 capital case process was resolved, which led to then one or two
15 rounds of additional motion practice after resolution of the
16 capital case process. Here, the government has agreed with
17 defense to refrain from motion practice for the eight months
18 already that this case has been pending for the specific reason
19 that we hope to proceed efficiently and expeditiously towards
20 trial once the capital case process is resolved.

21 We've highlighted for your Honor, again, the *Tsarnaev*
22 case in Massachusetts, the *Roof* case in South Carolina, the
23 *Mohammed* case in this district as the comparators that we think
24 are most appropriate for the reasons set out in our letters,
25 including that those cases largely related to single-incident

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1 allegations. And for *Tsarnaev* and *Roof*, it was a single
2 defendant.

3 But we think, sort of putting aside the comparisons,
4 your Honor, the facts here and the circumstances of this case
5 and the manner in which this case has been proceeding
6 efficiently show that an April trial date is appropriate here.
7 We've met all the deadlines that your Honor has set and all the
8 expectations that we've set in terms of production of
9 materials. We have tried to be responsive to any requests from
10 the defense. And, again, the allegations here relate to a
11 single incident and a single defendant. We think all of that
12 governs toward an April trial date being appropriate here.

13 THE COURT: OK. Thank you.

14 Mr. Patton or who? Mr. Patton.

15 MR. PATTON: Your Honor, I'll just say, to begin with,
16 the government's remarks that the capital process and setting
17 of a trial date are two separate matters, I just think is not
18 quite accurate. I continue to suggest to the Court that
19 setting a trial date before we have an answer on whether or not
20 the government is seeking the death penalty is premature
21 because so much of how this case will be handled depends on
22 that decision.

23 THE COURT: But I guess what I don't understand,
24 Mr. Patton, is why is the mere fact that I set a trial date,
25 how does that impact -- again, assuming that I don't set it in

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1 a time period that's shorter than any of the parties have even
2 posited -- how does that impact what you and your colleagues
3 are doing with regard to the consideration of the death penalty
4 or with regard to preparing for trial?

5 MR. PATTON: Because our request to the Court would be
6 to hold off on setting a trial date until resolution of
7 pretrial motions, and those motions depend almost entirely on
8 the government's decision whether or not to seek. There are
9 going to be significant challenges that I suppose I would
10 describe as broader challenges to the federal death penalty.
11 Case law has evolved over time. We think there are a lot of
12 issues that are not foreclosed even though they may have been
13 raised long ago, and there are issues specific to this case
14 with respect to the death penalty.

15 We'd like an opportunity to flesh those out before
16 scheduling the trial because the briefing of those motions and
17 I think the Court is going to require some time to weigh those
18 motions and to make those decisions, I assume it will probably
19 also involve some argument, until we have resolution of those,
20 it's hard for us to know how to focus our trial preparation and
21 just how time-consuming that preparation is going to be.

22 We've obviously tried our best to keep the Court
23 informed about all that is involved in putting together a
24 mitigation case in the event that the death penalty is sought.
25 As your Honor noted, there is a distinguishing factor here

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1 between this case and many others, which is not just that
2 there's overseas investigation, but where that overseas
3 investigation is specifically in a very difficult location,
4 both just to get to logistically and also to navigate once
5 we're there. Even domestically mitigation investigation is
6 far-flung because of Mr. Saipov's various locations.

7 So there's an awful lot to be done in this case. We
8 don't think that there is prejudice in holding off until we
9 resolve the pretrial motions phase, when we'll have a much
10 better idea of the length and scope of a trial, if there is to
11 be any trial at all.

12 THE COURT: I recognize that, but for purposes of
13 several fold, number one, notifying potential witnesses of what
14 time period they should block out. And, in particular, my
15 concern would be, quite frankly, with regard to the experts
16 because, at least in my experience -- and I'm not talking about
17 death penalty cases, but just experts in general -- their
18 calendars fill up fairly quickly. And were I to wait until I
19 resolved the pretrial motions, I fear what that would do is it
20 would push out -- because I suspect there would be issues with
21 regard to the calendars of the experts and perhaps even counsel
22 here with regard to their calendars filling up because they've
23 got trials that have been scheduled in other matters, which
24 would push this case even further out.

25 So I understand what you're saying. It just seems to

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1 me that with an appropriate date that gives sufficient time, I
2 hope, for the parties to take care of what they need to take
3 care of, for me to make the rulings -- again, obviously, if the
4 government chooses not to seek the death penalty, I can easily
5 modify that schedule.

6 Let me just make one thing clear, because there's been
7 back and forth, there have been letters that have indicated
8 what may or may not happen if the government does not seek the
9 death penalty. The decision about whether or not to go to
10 trial is going to be made by Mr. Saipov, and it's Mr. Saipov's
11 decision. And it's not a decision -- and I understand counsel
12 may be in communications with the government, but it's not a
13 decision that necessarily has to be made at this juncture, and
14 I'm not in any way requiring that any such decision be made.
15 So regardless of whether or not the government seeks the death
16 penalty or doesn't, Mr. Saipov would still be entitled to go to
17 trial.

18 Now, any date I set, if the government chooses not to
19 seek the death penalty, I may actually accelerate. In other
20 words, it will be a shorter time frame than what I'm thinking
21 about, but I just wanted to be clear on that issue. The
22 decision is Mr. Saipov's, and the fact that the parties may
23 have exchanged materials is irrelevant to my consideration
24 about when Mr. Saipov has to make that decision about pleading
25 guilty.

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1 I'm sorry, Mr. Patton, I interrupted you. I fully
2 intend -- well, let me ask you, do you have anything further
3 with regard to the trial date issue?

4 MR. PATTON: Just two things.

5 THE COURT: Yes.

6 MR. PATTON: There is significant discovery in this
7 case. We have continued to receive it. I think, just in the
8 past week or two, on the order of 1,500 pages translations.
9 I'm sure the government is working in good faith to get us what
10 they have and what they think they're going to produce, but
11 there are always, as we all know, additional discovery that
12 come down the pike. So we have a lot of discovery. It's
13 entirely possible, even though at this time the government
14 thinks it's made its production, they thought they had made
15 their production the last time when we met, by and large, and
16 yet we've continued to receive a significant amount. I'm not
17 casting blame. I'm just suggesting there's a fair amount of
18 volume.

19 It's entirely possible we'll continue to get
20 significant volume in this case. Our own investigation
21 involves a lot of material that is not in English, that is not
22 easily translated all the time. It depends on what language it
23 is. But we're dealing with a lot of different languages. So I
24 would just say that there is an additional factor in terms of
25 volume of discovery.

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1 In terms of blocking -- having sufficient time to
2 block out for experts, for anyone who needs to schedule time
3 surrounding the trial, I'm certainly not suggesting that we
4 would come to you after the motions briefing and ask for a
5 quick trial date. I think for all the reasons that we need
6 time to prepare, there would still be plenty of notice.
7 Assuming motions got resolved in the next six to nine months,
8 somewhere on that order, there would still be plenty of time to
9 set a trial date out in the future, but with a much better idea
10 of what will be required at trial.

11 THE COURT: All right. Thank you.

12 Yes, Ms. Houle.

13 MS. HOULE: Just a few points, your Honor. With
14 regard to your Honor's point about the scheduling of experts,
15 the government agrees and appreciates that point. I would just
16 note as well that many of the witnesses who are the surviving
17 victims of this attack are located outside the United States,
18 and so we believe that they as well need sufficient notice to
19 make sure that they can be available to travel to the United
20 States and spend sufficient time here for trial.

21 Your Honor, in regard to the comments made regarding
22 the translations that were recently produced, I just want to
23 clarify a bit the comment about 1,500 pages. I'm not saying
24 that that's inaccurate, but to be clear, the translations are
25 produced in a format that's essentially a chart. And so there

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1 are several columns, and it is not sort of 1,500 pages of dense
2 text. And the government has provided these translations in an
3 effort to be helpful to the defense and to ensure that we can
4 proceed quickly to trial, and so we would hate to have that
5 fact prejudice us in seeking a trial date.

6 THE COURT: OK. No, let me just state, if there's
7 material the government believes that it conceivably could use
8 that requires translation, doing those translations sooner
9 rather than later, obviously, makes sense. So I'm not faulting
10 anyone for that. And I do understand that does take time for
11 those materials to be translated, and there may be materials,
12 quite frankly, that the defense is going to translate that the
13 government has no interest in for one reason or another.

14 But having said that, I do think it does make sense to
15 set a trial date. And while, Mr. Patton, I appreciate that
16 there will be time once I decide the various motions to set it
17 down, my fear is that when we get to that juncture and I ask
18 counsel -- and, obviously, what we're going to have is a
19 conflict with many different schedules. Even in a normal case
20 where I'm just -- with or without experts, it takes time to
21 actually figure out where people's schedules are, so I want to
22 give everyone a date certain. And I'm probably the last one,
23 but I also like to, quite frankly, put it in my calendar
24 because, obviously, as a criminal matter, this takes precedence
25 over any other matter that I would have.

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1 So I plan on starting jury selection -- and we could
2 talk about this, what this means -- but October 7 of 2019. So
3 it is not as soon as the government has requested, but it is in
4 the range of what the defense has requested. And I think it
5 builds in sufficient time for whatever motion practice to occur
6 and for decisions to be made and for the parties to notify the
7 respective experts, in particular, but witnesses in general of
8 when that would be.

9 Now, I do think it's premature to discuss sort of
10 exactly what jury selection would look like, but I'm going to
11 notify, or have my deputy notify, the jury department that
12 we're looking to try and start the trial on Monday, October 7,
13 OK?

14 I think, Mr. Saipov, you first speak with your lawyer
15 and then --

16 THE DEFENDANT: (In English) OK.

17 THE COURT: Because if you have questions, speak with
18 your lawyer, then they can relay the questions to me, OK?

19 THE DEFENDANT: (In English) All right.

20 (Counsel conferred with defendant)

21 THE COURT: Mr. Patton, if you do need some additional
22 time, just let me know, and we can just take a brief break.

23 Why don't we do that. It's about 4:20 right now. Why
24 don't we come back in ten minutes. I'd like to give you the
25 opportunity to speak with your client. So we'll come back at

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1 4:30, OK? We stand adjourned for now.

2 (Recess)

3 THE COURT: Mr. Patton.

4 MR. PATTON: Your Honor, Mr. Saipov would like to very
5 briefly address the Court.

6 THE COURT: All right. Utilizing the services of the
7 interpreter?

8 MR. PATTON: Yes, your Honor.

9 THE COURT: OK. Go ahead, Mr. Saipov.

10 THE DEFENDANT: (In English) Are you on this?

11 (Through the interpreter) First of all, I would like
12 to start speaking by addressing to the creator of the heavens
13 and earth and all the living animals and souls between them.
14 Then, of course, I would like to say to be grateful to the
15 Prophet Muhammad before I speak.

16 So I have sat here and listened to the court and I've
17 participated in other courts before, and I say upon Allah, I
18 have to say that I didn't hear any meaning in these
19 conversations. And the reason is because I didn't -- there
20 isn't a judgment of Allah here because Allah knows what -- how
21 these -- his creations should behave and what they should do.
22 That's what Allah knows.

23 So the judgments that are made by them here, they're
24 not important for me because they don't know -- these are the
25 judgments of the living things, and they are not Allah's

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1 judgments, and they're making them of their weak minds. These
2 are judgments they're coming to.

3 MS. HOULE: Your Honor, may I just briefly?

4 THE COURT: Yes.

5 MS. HOULE: If you could just advise the defendant
6 before he proceeds further that any statements he makes can be
7 used against him.

8 THE COURT: Sure. So, Mr. Saipov, and I'm sure your
9 attorneys have indicated this, you have no obligation to say
10 anything here. And, in fact, you have a right to remain
11 silent. You have a right to say nothing. However, when you do
12 speak, however, regardless of how you may view these
13 proceedings, when you do speak, anything you say can be used by
14 the government, if it should choose to do so, in its case
15 against you.

16 THE DEFENDANT: I understand. I understand you, but
17 I'm not worried about this at all.

18 THE COURT: OK. All right.

19 THE DEFENDANT: So thereafter in the Quran, Allah said
20 that you can be in fear to everybody else, but be faithful to
21 me. This is written in the *ayat*. And this is the weak minds.

22 So what is someone that can tell you? The *taghut* is
23 this that says that these are the laws that are made up to --
24 to force upon other people. So I would like to be brief, and
25 so the Islamic State, in order to impose *sharia* on earth, is

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1 leading a war. So the Islamic State is not fighting for land
2 like some say, or like some say for oil. They have one
3 purpose, and they're fighting to impose *sharia* on earth.

4 MR. BEATY: Excuse me, your Honor, if I may?

5 THE COURT: Yes.

6 MR. BEATY: We're here discussing a trial date. This
7 is not an appropriate forum for a defendant --

8 THE COURT: I'll allow the defendant to finish. My
9 understanding from the body language is that he just has a
10 little bit more, and then we'll finish with the conference.

11 MR. BEATY: OK. Your Honor, I will just note that the
12 SAMs imposed limitations on the defendant's ability to
13 communicate with the media, in particular to limit his ability
14 to discuss terrorist propaganda. Given the direction that his
15 comments are going, I just wanted to bring that to the Court's
16 attention and indicate our concern.

17 THE COURT: I understand that. Well, I understand
18 that.

19 Go ahead.

20 THE DEFENDANT: Today I will speak briefly, if I am to
21 continue. And at the end of my statement, I will thank Allah
22 and I will thank the Prophet, and then I will say more
23 statements in the future court.

24 And I wanted to express my gratitude to the judge
25 here. I don't admit -- I don't accept this as my judge because

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1 this is -- I know the judge as *taghut*. I express my gratitude
2 to you for letting me speak.

3 THE COURT: Thank you, Mr. Saipov.

4 Just to be clear on something, Mr. Saipov, I did give
5 you an opportunity to speak today. I did not know what you
6 were going to say. Obviously, your statements, as I indicated,
7 were your own and made voluntarily, but I'll emphasize again,
8 number one, that -- I'm sorry.

9 I'll go back. I gave you an opportunity to speak
10 today, in part, because I was unaware of exactly what you
11 wanted to say, and I've allowed you to complete your statement
12 today. And I've indicated to you you're under no obligation to
13 say anything. Even if you made a statement today, you're under
14 no obligation to make any statements in the future. But to be
15 clear, in the future your lawyers are here to provide you legal
16 representation, and you can talk through them, and they can
17 communicate with me the matters that they deem appropriate and
18 related to this case.

19 There will be a time, if you choose to do so, when you
20 will be entitled to take the witness stand in your own defense,
21 and I'm not saying you have to at all, but where you'll have an
22 opportunity to do that if you choose to do so. After
23 communicating with your lawyers, you'll be entitled to do that.
24 But it's unlikely I'm going to give you any opportunities in
25 the future to make statements that aren't specifically related

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1 to the case and unless they're through your attorneys, OK?

2 All right. So we've got a trial date of October 7th.
3 Is there anything else that we need to deal with today?

4 MS. HOULE: Your Honor, at the last conference your
5 Honor indicated that you would set a motion schedule for
6 October 1, assuming that the capital case process was resolved
7 in September. We just wanted to confirm that the October 1
8 motion deadline stands?

9 THE COURT: It would, but I guess the question is,
10 although I have an understanding of some of the motions that
11 might be made, I don't, obviously, know the extent of all the
12 motions. So I'll leave it to the parties to meet and confer
13 about that, and if there's a logical sequencing of how those
14 motions should proceed, I'd leave it to the parties to come up
15 with that. Obviously, any discussion you have is preliminary,
16 and it would not preclude the defense from making any
17 additional motion should they believe they are appropriate.

18 Yes, Mr. Patton.

19 MR. PATTON: Your Honor, as a general matter, and I'm
20 happy to take up the Court's suggestion that we talk about this
21 with the government, but I would ask, or perhaps I'll say we
22 will ask, I think, for 60 days from the time that we get
23 notice. So if we receive early -- if we were to receive notice
24 in early September, that would be perhaps early November. Part
25 of the motions practice will depend on what the factors are

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1 that the Department of Justice cites in its authorization.

2 THE COURT: Look, I think that allowing 60 days for
3 the defense to prepare the motions after the government -- and,
4 again, to the extent the government does seek the death
5 penalty, I'll allow the 60 days from the date of that decision
6 for the motions to be made, yes.

7 MS. HOULE: Understood. Thank you, your Honor.

8 THE COURT: All right. OK. Anything else?

9 MS. HOULE: Your Honor, unless the defense has
10 anything else to raise, we'll just turn to the exclusion of
11 time.

12 THE COURT: Yes. So I'll exclude the time between now
13 and the trial date, which is October 7 of 2019, from the time
14 within which trial would have to begin in this case, and I find
15 that that exclusion of time outweighs the interest of the
16 public and Mr. Saipov in a speedy trial. That time is being
17 excluded to allow time for the capital process to complete,
18 allow the defense to consider what motions should be made, and
19 the motions to be made and for trial preparation. OK.

20 MS. HOULE: Thank you, your Honor. If you could just
21 inquire as to whether the defense objects to the exclusion of
22 time.

23 MR. PATTON: We do not object, Judge.

24 THE COURT: All right.

25 MS. HOULE: Thank you, your Honor.

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1 THE COURT: Anything else?

2 MR. PATTON: No, your Honor.

3 MS. HOULE: No, your Honor.

4 THE COURT: All right. Thank you very much. We'll
5 stand adjourned.

6 (Adjourned)

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